

Message

From: Makepeace, Caroline [Makepeace.Caroline@epa.gov]
Sent: 1/19/2021 9:58:35 PM
To: Porter, Amy [Porter.Amy@epa.gov]; Koslow, Karin [Koslow.Karin@epa.gov]; Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
CC: Denton, Loren [Denton.Loren@epa.gov]; Kelley, Rosemarie [Kelley.Rosemarie@epa.gov]
Subject: RE: DOJ Mitigation memo

Responding to both Loren and Karin's questions at once. The mitigation memo that DOJ issued is basically what we saw a few months – misleading and unnecessary statements about SEPs and the MRA, the typical pontificating tone which leaks over into statements that could/should be much better phrased, but basically no change to our current policy and practice. There is nothing in there that solidifies some of the case-by-case tussles, aka "the yellow truck" discussions that would lead to non-sensical results on a nexus analysis. In fact, when one of the RCs raised the question of whether we should "keep doing mitigation" on last week's OCE/RC/DOJ call, Tom M and Karen agreed that we should certainly all continue to pursue mitigation in appropriate cases, and nothing in the memo should change that (or the definition of "appropriate"). However, we agreed that it also made sense to discuss whether this memo should be looked at again, as we discuss the approach to the SEP memos, over the coming weeks and months.

Caroline Makepeace
Senior Counsel
Office of Civil Enforcement
US Environmental Protection Agency
202-564-6012

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From: Porter, Amy <Porter.Amy@epa.gov>
Sent: Tuesday, January 19, 2021 4:43 PM
To: Koslow, Karin <Koslow.Karin@epa.gov>; Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Cc: Denton, Loren <Denton.Loren@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>
Subject: RE: DOJ Mitigation memo

I believe that is correct but I'll let the real experts confirm. Caroline? John?

From: Koslow, Karin <Koslow.Karin@epa.gov>
Sent: Tuesday, January 19, 2021 4:41 PM
To: Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Porter, Amy <Porter.Amy@epa.gov>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Cc: Denton, Loren <Denton.Loren@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>
Subject: RE: DOJ Mitigation memo

All – during a call this afternoon, Larry asked whether the types of mitigation we can pursue in our cases has been formally restricted by the current Administration through memos like the one just issued last week.

My understanding is that Susan and DOJ leadership had preferences with respect to mitigation, but there is nothing formally in writing, other than this recent DOJ memo. Is that correct, or are we restricted through some other DOJ or EPA memo?

Thanks,
Karin

Karin Koslow
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WJC South Room 3142D

From: Koslow, Karin
Sent: Wednesday, January 13, 2021 2:10 PM
To: Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Porter, Amy <Porter.Amy@epa.gov>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: DOJ Mitigation memo

Thanks, Caroline – I wasn't aware. I'll forward to the IO for awareness as well.

Thanks,
Karin

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From: Makepeace, Caroline <Makepeace.Caroline@epa.gov>
Sent: Wednesday, January 13, 2021 1:14 PM
To: Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Koslow, Karin <Koslow.Karin@epa.gov>; Porter, Amy <Porter.Amy@epa.gov>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: FW: DOJ Mitigation memo

See Bloomberg article below – DOJ issued the Clark mitigation memo. Not sure if anyone was aware this was being issued, and it's been a while since we saw the draft.

It appears that they did take certain comments: somewhat revising a misleading pollutant to pollutant example at the end of I.b. on page 6; and stating the draft was shared with EPA prior to issuance versus "developed in consultation with EPA."

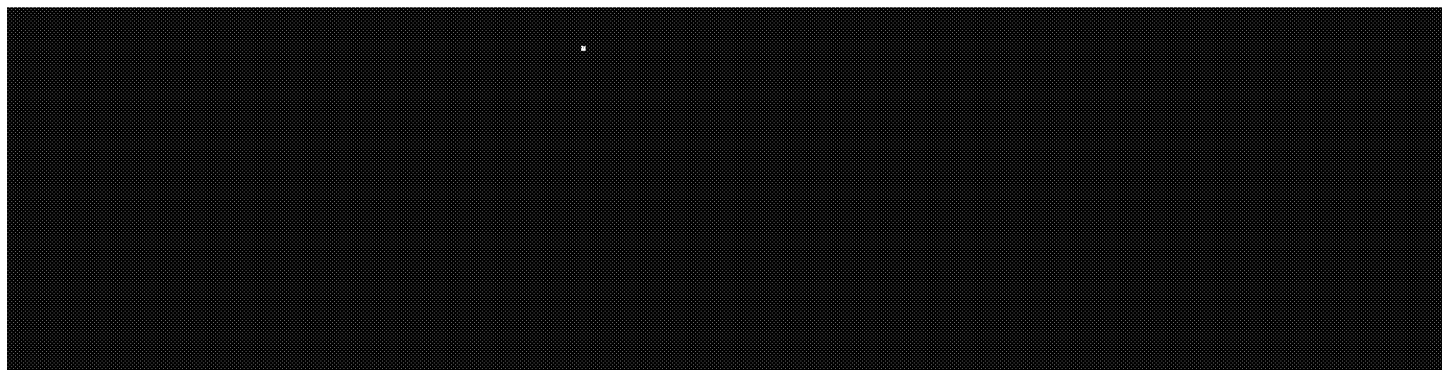
But they did not remove all the unnecessary discussion of SEPs and the MRA, nor revise the statements that were not accurately supported by the cases to which they cited.

However, as we noted before, the general principles/directions are fairly consistent with current practice.

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From: Bloomberg Law <bloomberg@bna.com>
Sent: Wednesday, January 13, 2021 12:48 PM
To: Makepeace, Caroline <Makepeace.Caroline@epa.gov>
Subject: Exclusive:



Environment & Energy Report

Wednesday, January 13, 2021

Justice Department Memo Targets Mitigation in Environment Cases

The Trump administration is limiting the inclusion of certain mitigation requirements in environmental enforcement cases, building on other Justice Department moves to set constraints on settlements.

Assistant Attorney General Jeffrey Bossert Clark issued a [memo](#) Tuesday, requiring lawyers in the Environment and Natural Resources Division to include “equitable

mitigation” relief in settlements only after considering a set of precautions “to ensure that our civil enforcement actions do not overstep the bounds set by Congress.”

Equitable mitigation refers to Justice Department lawyers’ practice of asking courts to force companies to remedy alleged violations by offsetting related environmental harms. It’s a form of relief often included in environmental settlements.

Clark’s policy is cause for “significant concern,” said Lois Schiffer, who led ENRD during the Clinton administration. “But this is all going to be revisited when he leaves, which is imminent.”

The incoming Biden administration is expected to review this and other Clark policies as soon as new political officials are installed. The president-elect hasn’t yet announced a nominee to lead ENRD.

‘Not a Blank Check’

Clark’s memo acknowledges courts’ power to order equitable relief, but says it’s “not a blank check.”

He cautioned attorneys in the environment division to weigh certain factors when considering such relief: that there’s a strong legal basis for mitigation; that there’s a geographic connection between a mitigation project and harm caused by a violation; that a project’s costs don’t outweigh its benefits; and that monetary penalties are still the first and primary form of relief sought.

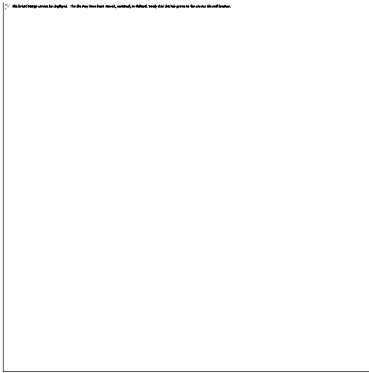
The directive builds upon Clark’s 2018 memo barring the use of “supplemental environmental projects” in settlements. SEPs, unlike mitigation, are voluntary efforts alleged violators can take to benefit the environment—sometimes in exchange for lower fines. But the projects often don’t have as close a connection to the alleged violations as equitable mitigation relief.

“The exact line between permissible mitigation relief and illegal SEPs can be difficult to trace,” Clark wrote.

Sidley Austin LLP lawyer David Buente said this week’s memo “is kind of like the other shoe falling.”

“The memo, if it’s implemented, will undoubtedly lead to it being used in fewer cases,” he said of equitable mitigation. “It will lead to a narrowing of it, but it’s not prohibiting it altogether.”

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